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2 **UNITED STATES COURT OF APPEALS**

3  
4 **FOR THE SECOND CIRCUIT**

5  
6 August Term, 2006

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8  
9 (Submitted: March 2, 2007) (Decided: November 21, 2007)

10  
11 Docket Nos. 04-4184-ag(L), 04-4185-ag(CON)

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13 - - - - -x

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15 JOSE GODOFREDO UCELO-GOMEZ and  
16 ANA MARIELA ESPANA-ESPINOZA,

17  
18 Petitioners,

19  
20 - v.-

21  
22 MICHAEL B. MUKASEY, Attorney General,\*

23  
24 Respondent.

25  
26 - - - - -x

27  
28 Before: JACOBS, Chief Judge, WALKER and WALLACE,  
29 Circuit Judges.\*\*

30  
31 This reviews a decision of the Board of Immigration  
32 Appeals on limited remand of a petition for review from an

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\* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case.

\*\* The Honorable J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, sitting by designation.

1 order of the Board of Immigration Appeals summarily  
2 affirming an Immigration Judge's denial of petitioners'  
3 applications for asylum and withholding of removal.

4 Upon further consideration, the petition is denied.

5  
6 Roberto Tschudin Lucheme,  
7 Glastonbury, Connecticut, for  
8 Petitioners.

9  
10 Francis W. Fraser, Margaret  
11 Perry, Office of Immigration  
12 Litigation, Civil Division,  
13 United States Department of  
14 Justice, Washington, D.C., for  
15 Respondent.

16  
17 PER CURIAM:

18  
19 Petitioners Jose Godofredo Ucelo-Gomez and Ana Mariela  
20 Espana-Espinosa (husband and wife), citizens of Guatemala,  
21 originally challenged a summary affirmance by the Board of  
22 Immigration Appeals ("BIA") of the oral decision of an  
23 immigration judge ("IJ") that (1) denied their applications  
24 for asylum and withholding of removal under the Immigration  
25 and Naturalization Act ("INA") and their applications for  
26 protection under the Convention Against Torture ("CAT"), and  
27 (2) directed their removal to Guatemala. Their asylum claim  
28 was premised on their membership in a social group composed  
29 of affluent Guatemalans who suffer persecution fueled by  
30 class rivalry in an impoverished society. This Court

1 vacated the BIA's order and remanded the case to the BIA by  
2 published opinion on May 9, 2006, so the BIA could determine  
3 in the first instance whether affluent Guatemalans in the  
4 petitioners' situation constitute a "particular social  
5 group" within the meaning of the INA. See Ucelo-Gomez v.  
6 Gonzales, 464 F.3d 163, 172 (2d Cir. 2006) (amending 448  
7 F.3d 180 (2d Cir. 2006)). The BIA was given 49 days to  
8 issue a responsive opinion; but the mandate of this Court  
9 was placed on hold on May 12, 2006. On June 19, 2006--  
10 before the end of the 49 day period but while the mandate  
11 was still on hold--the BIA issued a non-precedential  
12 opinion, affirming the IJ's decision on the grounds that  
13 petitioners had not shown that "affluent Guatemalans" are  
14 members of a particular social group and that they did not  
15 demonstrate they were persecuted or faced a well-founded  
16 fear of future persecution on account of a protected ground.  
17 See In re Espana-Espinoza & Ucelo-Gomez, A 79 781 430, A 79  
18 781 419 (B.I.A. June 19, 2006). In an amended opinion  
19 issued nunc pro tunc and filed on September 28, 2006, this  
20 Court clarified that its original remand was pursuant to  
21 United States v. Jacobson, 15 F.3d 19, 21-22 (2d Cir. 1994),  
22 and that the panel thus retained jurisdiction to rule upon

1 the petition on appeal following disposition of the remand.  
2 On October 2, 2006 the hold was lifted and the following day  
3 the mandate issued. The BIA later issued an identical  
4 precedential opinion, see In re A-M-E- & J-G-U-, 24 I. & N.  
5 Dec. 69 (B.I.A. Jan. 31, 2007), publishing as precedent In  
6 re Espana-Espinoza & Ucelo-Gomez, A 79 781 430, A 79 781 419  
7 (B.I.A. June 19, 2006).<sup>3</sup>

8 The BIA has fulfilled the terms of our remand by  
9 rendering a timely opinion as to whether affluent  
10 Guatemalans constitute a particular social group for asylum  
11 purposes. We retained jurisdiction to decide the issues set  
12 forth by the petition, and upon further consideration in  
13 light of the BIA's opinion, we now deny the petition.

14

15

#### BACKGROUND

16 The facts underlying Mr. Ucelo-Gomez's and Ms. Espana-  
17 Espinosa's petitions for review are set forth in detail in  
18 our previous opinion, see Ucelo-Gomez, 464 F.3d at 165-66,  
19 and the reader's familiarity with it is assumed.

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<sup>3</sup> The BIA's precedential decision amended its June 19, 2006 non-precedential decision by making editorial changes consistent with its designation of the case as precedent. See In re A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 69 n.1 (B.I.A. Jan. 31, 2007).

1  
2 **DISCUSSION**

3 **I**

4 "When the BIA issues an opinion, 'the opinion becomes  
5 the basis for judicial review of the decision of which the  
6 alien is complaining.'" Chen v. Gonzales, 417 F.3d 268, 271  
7 (2d Cir. 2005) (quoting Niam v. Ashcroft, 354 F.3d 652, 655  
8 (7th Cir. 2004)). As we stated in our opinion remanding the  
9 case, we grant Chevron deference to a precedential opinion  
10 of the BIA if the basic requirements of Chevron are met.  
11 See Ucelo-Gomez, 464 F.3d at 170; see also Shi Liang Lin v.  
12 U.S. Dep't of Justice, 494 F.3d 296, 304 (2d Cir. 2007) (en  
13 banc) ("When reviewing the BIA's interpretation of statutes  
14 that it administers, we apply the Chevron principles.").  
15 "Under the Chevron standard, we adhere to Congress' purpose  
16 where the INA clearly speaks to the point in question, but  
17 if the INA is silent or ambiguous, then we must defer to any  
18 reasonable interpretation of the statute adopted by the  
19 Board as the entity charged by Congress with the statute's  
20 enforcement." Kuhali v. Reno, 266 F.3d 93, 102 (2d Cir.  
21 2001) (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25  
22 (1999)). Here, after the BIA issued a non-precedential

1 decision, the agency subsequently had occasion to issue an  
2 identical precedential opinion construing the ambiguous  
3 statutory phrase "particular social group." We therefore  
4 inquire whether the BIA's construction was a reasonable  
5 interpretation of the statute.

## 7 II

8 In its precedential opinion, the BIA determined that  
9 "affluent Guatemalans" are not a "particular social group"  
10 for asylum eligibility purposes. Referring to the seminal  
11 decision of In re Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985),  
12 the BIA explained that members of a particular social group  
13 must share some common characteristic that members "either  
14 cannot change, or should not be required to change because  
15 it is fundamental to their individual identities or  
16 consciences." A-M-E-, 24 I. & N. Dec. at 74 (internal  
17 quotation marks omitted). The BIA went on to consider two  
18 factors identified in In re C-A-, 23 I. & N. Dec. 951  
19 (B.I.A. 2006): (1) membership in a purported social group  
20 requires a certain level of "social visibility" and (2) the  
21 definition of the social group must have particular and  
22 well-defined boundaries. A-M-E-, 24 I. & N. Dec. at 74.

1 The BIA's rulings on these points constitute sufficient--and  
2 affirmable--holdings.

3 1. Social Visibility. In re C-A-'s social visibility  
4 requirement is consistent with this Court's reasoning that a  
5 "particular social group is comprised of individuals who  
6 possess some fundamental characteristic in common which  
7 serves to distinguish them in the eyes of a persecutor--or  
8 in the eyes of the outside world in general." Gomez v. INS,  
9 947 F.2d 660, 664 (2d Cir. 1991). The BIA's decision relied  
10 heavily upon In re C-A-'s discussion of recent UN Guidelines  
11 that indicate that "persecutory action toward a group may be  
12 a relevant factor in determining the visibility of a group  
13 in a particular society." 23 I. & N. Dec. at 960 (emphasis  
14 omitted). However (as the BIA stated), although the  
15 existence of persecution is a relevant factor, "a social  
16 group cannot be defined exclusively by the fact that its  
17 members have been subjected to harm . . . ." A-M-E-, 24 I.  
18 & N. Dec. at 74 (emphasis added). Applying these  
19 principles, the BIA considered whether affluent Guatemalans  
20 are more frequently targeted by criminals than the rest of  
21 the Guatemalan population. The BIA concluded that they are  
22 not: "[V]iolence and crime in Guatemala appear to be  
23 pervasive at all socio-economic levels." A-M-E-, 24 I. & N.

1 Dec. at 74-75. Moreover, it matters that the petitioners'  
2 self-definition as a social group for asylum purposes  
3 depends on no disadvantage other than purported visibility  
4 to criminals. When the harm visited upon members of a group  
5 is attributable to the incentives presented to ordinary  
6 criminals rather than to persecution, the scales are tipped  
7 away from considering those people a "particular social  
8 group" within the meaning of the INA.

9 2. Well-Defined Boundaries. The BIA reasoned that the  
10 terms "wealthy" and "affluent" are highly relative and  
11 subjective. Id. at 76. As the BIA explained, "wealth or  
12 affluence is simply too subjective, inchoate, and variable  
13 to provide the sole basis for membership in a particular  
14 social group." Id. If "wealth" defined the boundaries of a  
15 particular social group, a determination about whether any  
16 petitioner fit into the group (or might be perceived as a  
17 member of the group) would necessitate a sociological  
18 analysis as to how persons with various assets would have  
19 been viewed by others in their country. The BIA also noted  
20 that if one defined "affluent" to include all of those  
21 Guatemalans who did not live in poverty, the group would  
22 make up twenty percent of the population. A-M-E-, 24 I. &

1 N. at 76 & n.8.<sup>4</sup> Moreover, because money attracts thieves  
2 in the ordinary course, and more money attracts more and  
3 better thieves, it would be impractical for IJs to  
4 distinguish between petitioners who are targeted or held to  
5 ransom because of their class status or merely because  
6 that's where the money is.

7 The BIA's analysis is consistent with existing BIA  
8 precedent holding that harm motivated purely by wealth is  
9 not persecution. See In re V-T-S-, 21 I. & N. Dec. 792,  
10 798-99 (B.I.A. 1997), cited by A-M-E-, 24 I. & N. at 72.  
11 Our own precedent validates the idea that class status does  
12 not establish a social group with sufficient particularity.  
13 See Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 240 (2d  
14 Cir. 1992) (holding that "poor" Yemeni Muslims are not a  
15 particular social group because the group "posses[es]  
16 broadly-based characteristics"). The BIA's interpretation

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<sup>4</sup> Like the petitioners, we agree that a large group can be a "particular social group"; the BIA must not mean that a group's size can itself be a sound reason for finding a lack of particularity. Instead, we interpret the BIA's observation as merely illustrating how "the concept of wealth is so indeterminate," id. at 76--the purported social group could vary from one to twenty percent of the total population. This indeterminacy is a relevant consideration in light of In re C-A-'s concerns about groups that are "too loosely defined to meet the requirement of particularity." In re C-A-, 23 I. & N. Dec. at 957.

1 of the statutory phrase "particular social group" as  
2 excluding affluent Guatemalans was therefore reasonable.

3  
4 **III**

5 The petitioners argued in their brief to the BIA on  
6 remand that "their political beliefs are imputed to them by  
7 virtue of their wealth[,] i.e. they must support the status  
8 quo as it protects the wealth they have accumulated." Pet'r  
9 BIA Br. 4. But the petitioners cited no evidence in the  
10 record that supports this assertion. As the BIA correctly  
11 concluded, nothing indicated that the individual or  
12 individuals who threatened petitioners "had any motive other  
13 than increasing their own wealth at the expense of" the  
14 petitioners. A-M-E-, 24 I. & N. at 76. It was therefore  
15 correct for the BIA to hold that the petitioners failed to  
16 meet their burden of proof in showing any evidence of a  
17 motivation for persecution other than membership in a  
18 particular social group.

19  
20  
21  
22 **CONCLUSION**

1           For the foregoing reasons, we deny the petition for  
2 review.